Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 1)

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–1200 OF 2007
HAMID SULTAN J
16 APRIL 2012

Civil Procedure — Judge — Application to recuse judge — Real danger of bias test — Whether appropriate case for recusal — Courts of Judicature Act 1964 s 20 — Judges' Code of Ethics 2009 s 11

When the present case came up for case management, the defendant made an application for the recusal of the trial judge on the grounds of judicial bias and a stay of proceedings until the disposal of the recusal application. The defendant had in an earlier application petitioned for the winding up of Comsa Properties Sdn Bhd ('CPSB'), which had a nexus to the plaintiff. The trial judge had found the defendant's winding up petition against CPSB to be 'oppressive and vindictive' and in consequence an abuse of process of court and thus dismissed the petition. It was the defendant's contention that the trial judge's decision in the winding up petition justified his recusal from the present case. The plaintiff submitted that the defendant's grounds for applying for recusal application were devoid of merit for not satisfying the 'real danger of bias' test, which justified disqualifying a judge from presiding over a case.

Held, dismissing the application with no order as to costs:

(1) This court found that the defendant's application was mischievous and an abuse of process of the court. In the Malaysian context, a recusal application would be more appropriate if dealt with informally through the office of the chief justice or managing judge. It follows from the wording of s 20 of the Courts of Judicature Act 1964 and s 11 of the Judges' Code of Ethics 2009 that a recusal application before a judge in the first instance is most inappropriate and the applicant could unnecessarily be exposed to contempt proceedings if it was later found that the application had been made in a cavalier manner and in bad faith so as to undermine the administration of justice (see para 11).

(2) In order to justify disqualification or recusal, the judge's bias usually should be personal or based on some extrajudicial reason. This court found that the 'real danger of bias' test imposed a high threshold for the applicant to satisfy. Thus, it would be a gross dereliction of duty for a judge to disqualify himself where there was no real danger of bias in hearing the case and an application for recusal with no appropriate grounds ought to be treated as an attempt to interfere with the

administration of justice. Further, the failure of the judge or the judiciary to protect the administration of justice was also viewed as dereliction of duty and omission to act pursuant to art 126 of the Federal Constitution (see para 11(h)).

(3) This court found that the defendant had failed to make out a case for recusal (see para 11(i)).

[Bahasa Malaysia summary

Apabila kes ini dikemukakan untuk pengurusan kes, defendan membuat permohonan untuk penarikan diri hakim perbicaraan atas alasan berat sebelah kehakiman dan penangguhan prosiding sehingga pendengaran permohonan penarikan diri. Defendan telah di dalam permohonan sebelumnya mempetisyen untuk menggulung Comsa Properties Sdn Bhd ('CPSB'), yang mempunyai hubungan dengan plaintif. Hakim perbicaraan mendapati petisyen penggulungan defendan terhadap CPSB adalah 'oppressive and vindictive' dan akibatnya penyalahgunaan proses mahkamah dan oleh itu menolak petisyen tersebut. Adalah hujahan defendan bahawa keputusan hakim perbicaraan dalam petisyen penggulungan menjustifikasikan penarikan dirinya daripada kes ini. Plaintif berhujah bahawa alasan defendan untuk memohon permohonan penarikan diri tidak bermerit kerana tidak memenuhi ujian 'real danger of bias', yang menjustifikasikan hakim tidak layak daripada menghakimi kes.

Diputuskan, menolak permohonan tanpa perintah kepada kos:

(1) Mahkamah ini mendapati bahawa permohonan defendan adalah memudaratkan dan penyalahgunaan proses mahkamah. Dalam konteks Malaysia, permohonan penarikan diri adalah lebih wajar jika berurusan secara tidak rasmi melalui pejabat Ketua Hakim Negara atau hakim yang mengurus. Daripada perkataan s 20 Akta Mahkamah Kehakiman 1964 dan s 11 Kod Etika Hakim 2009 bahawa permohonan penarikan diri di hadapan hakim pada mulanya adalah tidak wajar dan pemohon boleh tanpa sebab terdedah kepada prosiding menghina jika ia kemudiannya didapati bahawa permohonan telah dibuat dengan cara sombong dan niat jahat seperti untuk menjejaskan pentadbiran keadilan (lihat perenggan 11).

(2) Untuk menjustifikasikan ketidaklayakan atau penarikan diri, berat sebelah hakim selalunya patut menjadi peribadi atau berdasarkan atas sebab luar bidang kehakiman. Mahkamah ini mendapati bahawa ujian 'real danger of bias' mengenakan ambang tinggi untuk dipenuhi oleh pemohon. Oleh itu, ia akan menjadi keabaian kasar tanggungjawab untuk hakim untuk tidak melayakkan dirinya di mana tidak terdapat bahaya berat sebelah dalam mendengar kes dan permohonan untuk penarikan diri tanpa alasan wajar patut dianggap sebagai percubaan

untuk campur tangan dengan pentadbiran keadilan. Selanjutnya, kegagalan hakim atau kehakiman untuk melindungi pentadbiran keadilan juga dipandang sebagai keabaian tanggungjawab dan ketinggalan untuk bertindak berikutan perkara 126 Perlembagaan Persekutuan (lihat perenggan 11(h)).

(3) Mahkamah ini mendapati bahawa defendan gagal untuk mengemukakan kes untuk penarikan diri (lihat perenggan 11(i)).]

Notes

For cases on application to recuse judge, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4139–4148.

Cases referred to

Charles Forte Investment Ltdv Amanda [1963] 1 Ch D 240, CA (refd)

Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 5 MLJ 206; [2008] 3 CLJ 653, CA (refd)

Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khium Fui [1978] 2 MLJ 24, FC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Ismail Zakaria v PP [2009] 8 MLJ 776; [2009] 9 CLJ 125, HC (refd)

Lee Kuan Yew v Tang Liang Hong & Anor and Other Actions [1997] 2 SLR 233, HC (refd)

Locabail and Another v Timmins Gormley and Others [2000] QB 451, CA (refd)

Malaysian Assurance Alliance Berhad v Comsa Properties Sdn Bhd [2010] 1 LNS 977

Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin [2009] 4 MLJ 484; [2009] 3 CLJ 513, FC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)

Michael Chow Keat Thye v Suruhanjaya Sekuriti Malaysia & Sime Darby Nominees Sdn Bhd, Suit No R1–25–288–11 of 2011 (unreported), HC (refd)

Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara [2001] 2 MLJ 481; [2001] 4 CLJ 701, HC (refd)

R v Inner West London Coroner, ex parte Dallaglio and another [1994] 4 All ER 139, CA (refd)

R v Metropolitan Police Commissioner exparte Blackburn (No 2) [1968] 2 QB 150, CA (refd)

Teh Wee Khiang & Ors v Teh Wee Chye & Ors [2009] MLJU 1305; [2010] 2 CLJ 916, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 20
Federal Constitution art 126
Judges' Code of Ethics 2009 s 11
Rules of the High Court 1980 O 34

Chevalier Ambiga (Mohd Rizal with him) (Bahari & Bahari) for the plaintiff. R Vinayaga (Vijay Raj with him) (Skrine) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the defendant's application seeking for my recusal not on the grounds of any form of nexus directly or indirectly with the parties to the suit, but solely on the grounds that: (i) I have not allowed a winding-up petition against Comsa Properties Sdn Bhd (which has nexus to the plaintiff) for an indebted sum; and (ii) in that judgment I have concluded that the petition was oppressive and vindictive, tantamount to an abuse of process of court, and the application was filed with the view to paralyse Comsa Properties Sdn Bhd. The judgment has been published and reported as *Malaysian Assurance Alliance Berhad v Comsa Properties Sdn Bhd* [2010] 1 LNS 977.

[2] When the matter came up for case management on 27 March 2012, the defendant's junior advocate, Mr Vijay Raj, informed the court that they have filed an application for my recusal, and wanted to stay proceedings until the hearing and disposal of an application which had not been sealed and served. I informed the defendant that in the present 'fast track system', matters have to be justly, expeditiously and economically be dealt with. Pursuant to O 34 of the Rules of the High Court 1980, I suggested to them a recusal application is not necessary, but I have no objection for them to meet the Chief Judge of Malaya ('CJM') or the managing judge, and request for the file to be transferred to another judge. I have also made it very clear that I would proceed to give further directions for trial, and in fact I have fixed a trial date notwithstanding the fact that the defendant had informed me that they have also filed an application to strike out the plaintiff's action for want of prosecution.

[3] The defendant chose not to seek directions from the CJM or managing judge but to file this recusal application. And also comments in the submission encl 42 as follows:

> 15. The Defendant has also expressed concern on trial dates being fixed after the current Recusal and Striking Out Applications were filed, and prior to commencement of Case Management preparations.

[4] Michael J Beloff QC, in his paper 'Conflict of Interest-Recusal of Judges in the Commonwealth: The United Kingdom Dimension', says:

> For the practising advocate care must be taken not to lend himself manifestly abusive application.

And cites as follows:

> Para 6109a) of the Bars Code of Conduct which makes barrister personally responsible for conduct and presentation of case, and he/she must exercise personal judgment on substance and purpose of statements made the questions asked. In *Arab Monetary Fund v Hashim* (1994) 6 Admin LR 348 Sir Thomas Bingham MR said: 'Just as an inference of apparent bias is not to be lightly drawn, so a charge is not to be lightly made. That remains true even where, as here, any suggestion of actual bias is expressly disclaimed Cases may unhappily arise in which evidence of bias or apparent bias so clear that an application for the discharge or removal of a judge is justified. But such an application is never justified simply by the instructions of the client. Counsel's duty to the court and to the wider interests of justice … requires that he should not lend himself to making such an application unless he is conscientiously satisfied that there is material upon which he can properly do so.'

(See 'Judges and Judicial Accountability', edited by Cyrus Das and K Chandra, p 83, Universal Law Publishing.)

[5] I will also in this judgment address the issue why an application for recusal should be made before the CJM or managing judge rather than unnecessarily to embarrass and/or burden the trial judge when there are other specific modes provided by statutes, and also the present practice of managing judge having control over the assignment of work to trial judges in the 'fast track system' which may not be found in England and/or other jurisdiction,

[6] The parties have relied on the following cases: *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara* [2001] 2 MLJ 481; [2001] 4 CLJ 701; *Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin & Another Appeal* [2009] 4 MLJ 484; [2009] 3 CLJ 513; *Ismail Zakaria v Public Prosecutor* [2009] 8 MLJ 776; [2009] 9 CLJ 125; *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; *Lee Kuan Yew v Tang Liang Hong & Anor and other actions* [1997] 2 SLR 233; *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206; [2008] 3 CLJ 653; *R v Inner West London Coroner, ex parte Dallaglio and another* [1994] 4 All ER 139; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501.

BRIEF FACTS

[7] Learned counsel for the defendant has taken the relevant parts of the judgment complained of, which read as follows:

> And the act of winding-up, when holding security, must be seen to be an *oppressive* conduct and in consequence an *abuse of process* of court. In addition, seeking appointment of liquidators to have a general control over all assets of the company must be seen to be a *vindictive* step *to paralyse* the respondent. … Failure of the petitioner to sell the assets in satisfaction of the debt or part thereof must be seen as *vindictive* which the winding-up court ought not to entertain.

PRELIMINARIES

[8] Both learned counsel have placed a comprehensive submission. Much judicial time will be saved if the relevant parts of the submission are reproduced. In encl 42, learned counsel for the defendant, inter alia, says as follows:

> 12. There is no need to establish actual bias. It is enough to establish the appearance of bias. The test is whether having regard to all the circumstances there appears to the court considering the matter to be a real danger of bias: *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 at 300-1 and Halsbury Laws of England, 4th Ed 2001 Reissue, Vol. 1(1) paragraph 99.
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> 13. If words in a judgment leave a reasonable impression that an issue was pre-determined; or if a question was decided on assumptions or generalizations; or if a conclusion is not supported by evidence; or if arguments raised are not addressed, or if strong language is used in a judgment albeit unintentionally; or if views are expressed in unbalanced terms; or there was doubt about the ability to ignore predilections; it may be suggested that there could be a real danger of bias: *Metramac Corporation v Fawziah Holdings* [2007] 5 MLJ 501 at 523, 525-6 and 532-3. Please see also *R v Inner West London Coroner* [1994] 4 All ER 139.
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> 14. In Metramac, the Federal Court set aside a judgment of a 3-judge panel of the Court of Appeal, although much of the concern was in relation to statements in the judgment directed against non-parties. On our facts, the Judgment in the NCC Petition was made by your Lordship sitting alone, and the statements therein were directed against the party there and here in relation to the same loan and underlying transaction, and importantly, the request for recusal is taken not to set aside a judgment, but at the outset before commencement of Case Management preparation.
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> 15. The Defendant has also expressed concern on trial dates being fixed after the current Recusal and Striking Out Applications were filed, and prior to commencement of Case Management preparations.

[9] In respect of para 15 of the above submission, I must say I take strong dissent. It is not for the defendant or his advocate or counsel to dictate how a trial judge should manage the file in the administration of justice. The learned

author of 'The Law of Contempt of Court and of Legislature, Justice Tek Chand' at pp 3–4 makes this pertinent observation:

> There are many kinds of contempts. The chief forms of contempt are insult to judges, attack upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of courts, witnesses or the parties, abusing the process of the Court, breach of duty by officers connected with the Court and scandalizing the judges or the Courts. The last form occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disrepute. In this conduct are included all acts which brings the Court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single Judge or a single court but may, in certain circumstances, be committed in respect of the whole of the judiciary or judicial system.
>
> A Division Bench of the Gauhati High Court (K.N.Saikia, Acting CJ. (as His Lordship then was and T.CDas.J.) has held that the categories of contempt are not closed by the definitions. The Bench said:
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> > It is essential to safeguard the dignity of the Court and protect it from any attack from any one which would undermine this dignity and lower the court's prestige in the eyes of the common man. So what would offend this dignity and lower the court's prestige is a matter for the court to decide. Its discretion cannot be confined within the four walls of a definition. This does not mean that the court shall not be guided by the definitions given in the Act but the categories of contempt are wilful disobedience. Wilful connotes purposeful and clear intention to flout.

[10] Learned counsel for the plaintiff's submission in encl 43, inter alia, reads as follows:

> The Test — 'Real Danger of Bias'
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> 1. The Federal Court case of *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara* [2001] 2 MLJ 481; [2001] 4 CLJ 701 (Tab 1 PBA) has succinctly laid down the test to be applied in a recusal application, which is the 'real danger of bias' test.
> 2. The Plaintiffs further rely on the legal definition of judicial bias as defined in Black's Law Dictionary (Tab 3 PBA), the relevant excerpts as follows:
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> > … Bias that a judge develops during a trial. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial reason …
>
> The Recusal Application
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> 3. In the Recusal Application, the Defendant primarily relies on one issue only, that is in dismissing the Defendant's winding-up petition in the

Winding-Up Petition No D-28-NCC-283-2009 ('Winding-Up Petition') against the 2nd Plaintiff Comsa Properties Sdn Bhd, My Lord had concluded that the petition was 'oppressive and vindictive, tantamount to an abuse of court process and filed with a view to paralyse the respondent'.

4. The Plaintiffs humbly submit that My Lord's decision in the Winding Up Petition has been taken out of context and does not satisfy the 'real danger of bias' test as propounded in the Federal Court case of *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara* [2001] 4 CLJ 701.

5. The Plaintiffs further submit that the issues of facts and law before My Lord at the hearing of the Winding-Up Petition was distinct and unique to a winding-up proceeding and therefore does not and should not be construed as My Lord's view of the Defendant in these proceedings. In short, the Defendant's ground in support of the Recusal Application is nothing short of conjecture. Therefore, it warrants no consideration.

6. In support, the Plaintiffs have summarised the grounds considered in dismissing the Winding-Up Petition, which are as follows:-

6.1 … When the respondent denies total liability and the defence merits consideration then the winding-up court forum is not proper to investigate the issue more so when the respondent alleges that he is solvent and there are substantial assets of the respondent in the hands of the petitioner which have not been liquidated …

6.2 Further, even if the petitioner has obtained judgment against the respondent that does not mean the winding up order as it would be inequitable to do so as the respondent is holding valuable securities and 'prima facie' the respondent cannot be said to be insolvent.

6.3 … In the instant case the respondent has charged the property to the petitioner, disputes liability and says the property ought to be sold first. In consequence the winding up court is obliged to consider the fact that the legal rights of the petitioner are subject to equitable consideration. And the act of winding up, when holding security, must be seen to be an oppressive conduct and in consequence an abuse of process of court. In addition, seeking appointment of liquidators to have a general control over all assets of the company must be seen to be vindictive step to paralyze the respondent …

7. At this stage, the Plaintiffs humbly refer to the Federal Court case of *Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin & Another Appeal* [2009] 4 MLJ 484; [2009] 3 CLJ 513 [Tab 2 PBA], and the relevant excerpt of the case is reproduced for My Lord's ease of reference:

> … It is now necessary to deal with the merits of the recusal application. On the question of judicial bias, the law in this area is settled. The test is premised on the 'real danger of bias' as propounded in *R v Gough* [1993] AC 646 which was approved and applied by the Federal Court

in numerous cases such as *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65; *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara* [2001] 2 MLJ 481; [2001] 4 CLJ 701; *Dato' Tan Heng Chew v Tan Kim Hor & Another Appeal* [2009] 5 MLJ 790; [2006] 1 CLJ 577 and recently in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 5 MLJ 501; [2007] 4 CLJ 725. In this case, the court was urged to recuse my learned brother Augustine Paul FCJ from being one of the panel members to hear the appeals on the grounds that the respondent had been critical of the learned judge in his website and that there might be a 'real danger of bias' on the part of the learned judge if he sat on the panel to hear the appeals. Be it noted that it is the respondent who was critical of my learned brother Augustine Paul FCJ in his website in 2001. And there was no response by the learned judge against the criticism. Furthermore, the respondent was never cited for contempt for the criticism. With regard to the objection raised by learned counsel about my learned brother Augustine Paul FCJ having dismissed the previous application for habeas corpus by the respondent, it is our view that a judge is not precluded from hearing a case against a person when he had in the past heard another case against the person if the facts in the cases are different …

8. In summary, My Lord in dismissing the Winding-Up Petition had not deliberated nor made any finding of fact and/or law as to whether the Defendant has perpetrated any fraud against the Plaintiffs, as claimed in the Statement of Claim filed herein.

Conclusion

9. The Plaintiffs humbly submit that the Recusal Application is devoid of merits. There is absolutely no reason to doubt or question My Lord's impartiality, then sitting as a judge in the winding-up court and now in these civil proceedings.

10. My Lord's role men being distinct and peculiar to the winding up proceedings does not pose any real danger of bias in the present case and that no reasonable and fair minded person sitting in court and knowing the relevant facts would have considered there was a real as opposed to fanciful danger of a fair trial not being possible.

Wherefore the Plaintiffs' humbly prays for the Recusal application to be dismissed with cost.

[11] I have read the application, affidavits and submission of the parties in detail. Having given much consideration to the submission of learned counsel for the defendant, I take the view that the application is mischievous and abuse of process of court. My reasons, inter alia, are as follows:

(a) recusal application by its own nature is an application against a judge

A and/or administration of justice. If it is made in a cavalier manner or bad faith, it may attract the jurisprudence relating to contempt. The contempt proceedings can be initiated by the judge or any party to the proceedings immediately upon an application for recusal has been made, or at anytime thereafter or even after the suit has been disposed of. In *R v Metropolitan Police Commissioner exparte Blackburn (No 2)* [1968] 2 QB 150, Salmon LJ had this to say:

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> It follows that no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith.

C

(b) In the Malaysian context, recusal application will be more appropriate if it is informally dealt with through the office of CJM and/or managing judge (see *Teh Wee Khiang & Ors v Teh Wee Chye & Ors* [2009] MLJU 1305; [2010] 2 CLJ 916). The reasons, inter alia, are as follows:

D

(i) Under s 20 of the Courts of Judicature Act 1964, the distribution of business among the judges of the High Court is at the discretion of the chief justice. The said section reads as follows:

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> The distribution of business among the judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the chief judge.

(ii) Under the 'fast track system', the distribution of work is monitored by the managing judge at the direction of the CJM.

F

(iii) Section 11 of the Judges' Code of Ethics 2009 states:

> A judge shall comply with any administrative order or direction issued by the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts from time to time.

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(c) In essence no individual judge has a right to hold on to the file against the direction of the CJM. It follows from the wording of s 20 of the Courts of Judicature Act 1964 and s 11 of the Judges' Code of Ethics 2009 that a recusal application before a judge in the first instance is most inappropriate and the applicant may unnecessarily be exposed to contempt proceedings if it is later found to have been made in a cavalier manner and in bad faith and/or to undermine the administration of justice. Trumpeting English cases on procedural aspect for recusal application which does not deal with similar statutory provisions may not accord with legislative intent. The well-known judge and jurist Andrew Phang, in his article *Recent Developments in Singapore Contract Law — The Search for Principle* [2012] 2 MLJ cxix Malayan Law Journal Articles 2012, says:

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This demonstrates the fact that although English law is the foundation of Singapore law, Singapore courts have embarked on the development of jurisprudence that reflects the particular needs of the country in general and commercial parties in particular. As observed in the Singapore High Court decision of *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board*:

> 27 … English law, having been 'exported' to so very many colonies in the past, has now to be cultivated with an acute awareness of the soil in which it has been transplanted. It must also be closely scrutinised for appropriateness on a more general level — that of general persuasiveness in so far as logic and reasoning are concerned. This is the essence of the ideal of developing an autochthonous or indigenous legal system sensitive to the needs and mores of the society of which it is a part. Only thus can the society concerned develop and even flourish. I have pointed out elsewhere the debt that is owed to the late ProfG W Bartholomew in first propounding this concept of autochthony (see *CHS CPO GmbHv Vikas Goel* [2005] 3 SLR(R) 202 at p [87]). The concept itself may appear simple. However, its profound intangible impact cannot be underestimated; still less its practice, which is probably the most difficult aspect of all.
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> 28 It is therefore to be welcomed that English law is no longer accepted blindly. This is not to state that it has not served jurisdictions such as Singapore, even outstandingly well. But there ought to be departures where either local conditions and/or reason and logic dictate otherwise. 'Indeed, the essence of the former is embodied within s 3(2) of [the AELA]'.
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> In a similar vein, it was observed in Man Financial that:
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> [L]ocal courts must simultaneously recognise that the days of a uniform commercial law are no longer a given. It is true that in the commercial context, there is more likelihood of (and desirability for) uniformity. However, even in the commercial setting uniformity should not be taken too far.
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> *It should be noted that such an approach, viz.. developing jurisprudence in accordance with logic and local conditions, is not confined to commercial law.* (Emphasis added.)

(d) The central complaint of the defendant is in relation to words such as 'oppressive', 'abuse of process' etc, as set out above in the judgment relating to a winding up petition. The law does not require the judge to mince his words when it is required in law to be expressed so. Words such as 'scandalous', 'frivolous', 'vexatious', 'abuse of process of court' are all found in the rules of court and the judge is required to make such findings when dealing with an action or winding up proceedings, more so in striking out matter and also at all stages of trial pursuant to inherent jurisdiction (see *Charles Forte Investment Ltdv Amanda* [1963] 1 Ch D 240); *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khium Fui* [1978] 2 MLJ 24). When an application is scandalous, frivolous, abuse of

process of court etc, it will also have some generic similarity to words such as 'mischievous' or 'vindictive' etc, to express the gravity of the conduct of the litigant. Even in a case of trial if the witness is not telling the truth, the judges have expressed it in different words such as 'not a witness of truth', 'lied' 'perjured', 'economical with the truth' etc. In my view, if such words are not expressed as required by law etc. within the norms of judicial propriety it will fall short of what we often refer to as a speaking judgment;

(e) judicial propriety in essence is the unwritten code of ethical conduct practiced by judges to maintain the highest traditions of judicial rectitude, independence and impartiality. It is well-recognised that judgments should be objective, rational and temperate in language. They must be free from exaggeration and undignified expressions. That does not mean the judge is restrained from criticising in his judgment matters relevant to the conduct and merits of the case, and of persons who are witnesses, provided it is relevant to the case. Senior advocate, S Balarajah, of the Johore Bar, in an article published by INFO Johore Bar (2012) quoted a paragraph which is relevant to the subject matter and it reads as follows:

In the book 'The Art of Writing Judgment' B. N. Chaudhuri wrote as follows:

> A Magistrate is fully justified in making criticisms in his judgment (provided he does so in restrained and decorous terms), of matter relevant to the conduct and merits of the case and of persons who are witnesses but he should confine his criticisms to matter that are strictly relevant to the issue involved. He should be careful to avoid criticisms of the conduct of persons who are not witnesses specially when they are in responsible official position. While on the one hand Courts are at liberty to discuss the conduct of the persons before them either as parties or as witnesses, untrammelled by any considerations on the other they are not permitted to travel beyond the record and are bound to exercise due restraint on the language employed by them. In other words, they should neither make any such sweeping assertions as are not borne out by the evidence produced before them nor should they use language which is unduly harsh. They should play the part of the judges alone and not that of propagandists and confine their whole attention to the evidence led before them and to the matters requiring determination at their hands. It is incumbent upon a magistrate to exercise proper restraint in making damaging observations. A Magistrate should not in his judgment in a criminal case make observations prejudicial to the character of any person who is neither a witness nor a party to the proceedings and who has had no opportunity of being heard and upon material which is not legal evidence in the case.
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> The language of a judgment should be temperate and sober and not satirical. Where the Magistrate's own order exculpates rather than inculpates the accused he is not justified in making remarks seriously to the accused's prejudice which will be justified only if this order tended to inculpate rather than exculpate.

(f) Generally, judge's finding made according to law in a particular suit cannot be a ground for a recusal application in other suits. I am in total agreement with submission of learned counsel for the plaintiff, Chevalier Ambiga Sreenevasan, that to justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial reason. Support for the proposition is found in a number of cases. To name a few are as follows:

(i) in *Locabail and Another v Timmins Gormley and Others* [2000] QB 451, the English Court of Appeal had this to say:

> It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided We cannot however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means of sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history nor that of any member of the judge's family, or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitors or advocates engaged in a case before him; or membership of the same Inn, circuit. Local law society or chambers (*KFTCIC v Jcori Estero Sp A* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report Vol 6M 8/91).

(ii) The *Locabail* test has to be qualified by what was said by Justice Augustine Paul in the case of *Mohamad Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 ML J 481. The learned judge had this to say:

> Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact, it would be a gross dereliction of duty for a judge to disqualify himself when there are no grounds.

(g) I must say here the 'real danger of bias' test imposes a high threshold for the applicant to satisfy. In a yet unreported case (see *Michael Chow Keat Thye v Suruhanjaya Sekuriti Malaysia & Sime Darby Nominees Sdn Bhd,* Suit No R1–25–288–11 of 2011, Kuala Lumpur High Court), Justice Abang Iskandar bin Abang Hashim in an illuminating judgment went on to stress the nexus requirement within the judge, the parties and the objectivity of the administration of justice itself inclusive of the duty and

obligation of the judge pursuant to his constitutional oath. His Lordship sums up the test for recusal in an eloquent and practical manner, and that part reads as follows:

> So in the final analysis, in the context of a potential conflict, it is not the question of whether or not a judge wants or insists, or that he does not want, to hear a case, because the practical test is rather simple, 'If there is no real danger of bias on the part of the judge, then he ought to, nay he is duty bound to hear the case, and there are no two ways about it.' I think that, in all humility, is the simple rule of the thumb for a judge to observe and apply.

(h) On my part I will say that: (i) it will be a gross dereliction of duty for a judge to disqualify himself when there is no real danger of bias in hearing the case; (ii) when an application for recusal is made with no appropriate grounds or prospect of success such an application must be treated as an attempt to interfere with the administration of justice; (iii) in such instance, where appropriate, once the suit has been disposed of the court should proceed to issue show cause letter against the relevant person or persons who attempted to place the administration of justice to disrepute; and (iv) failure of the judge or the judiciary to protect the administration of justice will, in my view, also stand as dereliction of duty and omission to act pursuant to art 126 of the Federal Constitution which states:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

(i) I am in total agreement with learned counsel for the plaintiff that the defendant has not made out a case for recusal.

[12] For reasons stated above, the defendant's application encl 33 is dismissed with no order as to costs.

I hereby order so.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan